On July 17th the defendants repudiated this contract. On September 4th, 1953 the plaintiff issued a writ in the present action and on October 28, 1953, the plaintiff discontinued the earlier proceedings.

In the present proceedings pleadings were delivered and on December 1st, 1953, the defendants delivered an amended Defence and Counterclaim. There were two substantial grounds of defence; by paragraph 2 of the Defence the defendants contended that the plaintiff, in the event of a breach by the defendants of the second contract, was thrown back on his remedies on the first contract. We do not agree with this view. It appears that there were two contracts for the sale of goods and in the event of a breach of the second contract, the plaintiff could have proceeded to sue on both contracts. The two transactions were not mutually exclusive. Paragraph 1 of the defence set out the substantial defence. It contended that the first contract was void for illegality and, therefore, that there was no consideration for the second.

In the Court below evidence was given to the effect that there were pens on the market sold with the registered trade mark of "Platignum". It was contended that the mark "Platinum" was a colourable imitation of this. Probably the defendants would, on this ground have had a good defence to the first action whether on the ground that the first contract was void for illegality or otherwise. When the defendants entered into the second contract they believed that they were liable under the first contract. Probably they would not otherwise have entered into the second contract. But that does not mean that there was no consideration for the second contract which was for the sale of pens at so much a dozen. Possibly the second contract could have been attacked on grounds of mistake or misrepresentation, but this has not been done.

At the trial the learned Judge decided the case on another ground, that the illegality of the first contract attached itself to, and vitiated, the second contract. We do not agree with this view. The second contract was a perfectly lawful one and in no sense furthered the unlawful purpose of the first one. We think that the respondents are entitled to succeed on the cross-appeal. The appeal depends on the failure of the cross-appeal. It is therefore dismissed. In the Court below the question of damages on the claim was not considered. We think there must be a new trial confined to the question of damages.

Appeal dismissed.

Cross-appeal allowed and a new trial ordered, limited to the question of damages.

Costs of appeal and cross-appeal and of the trial to respondent. Deposit to respondent.

Brown J. : —I agree. If the contract dated 6th March 1950 for the sale of "Platinum" pens was tainted with illegality for the reason that it contravened the Merchandise Marks Ordinance, no such taint attaches to the contract dated 8th July 1953 for the sale of "Lamalad" pens which did not contravene the Ordinance. But the appellants contended that the second contract provided only one remedy for its breach, namely that the plaintiff should continue with Suit No. 980 of 1953 in respect of the "Platinum" pens. I do not agree that, upon a proper construction of the letter dated 8th July 1953, the parties were imposing any such limitation upon the plaintiff's right of redress in respect of the "Lamalad" pens. By para. 5 the plaintiff is to be entitled to continue with Suit No. 980 of 1953 (in respect of the "Platinum" pens) in the event of the defendants failing to comply with any of the terms of the contract in respect of the "Lamalad" pens. That paragraph does not exclude the plaintiff's right to sue upon the contract for the sale of the "Lamalad" pens. It merely left it open to him to continue with his action in respect of the "Platinum" pens, if he chose to do so.

Appeal dismissed;
Cross-appeal allowed.

Solicitors: *Christopher & Francis; Braddell Bros.*

TAN KIM NEO (f) & ORS. v. TAN TECK BEE & ORS.

[C. A. (Mathew C.J., Murray-Aynsley C.J. (S) and Wilson J.) December 21, 1954.]

[K. L.—F. M. Civil Appeal No. 14 of 1954]

Administration of Estate — Extension of business belonging to estate by administrator — Administrator cannot profit from his trust.

The 1st respondent was the sole administrator of his father's estate. At a meeting between the appellants (daughters of the deceased) and the 1st, 2nd and 3rd respondents (sons of the deceased), it was decided to resuscitate the father's business. Later through the initiative and energy of the 1st respondent the family business was extended. The 1st respondent had intended the extensions to be his own concerns. The question is whether he is bound by his fiduciary position as administrator to hold these extensions in trust for the beneficiaries of the estate.

Held: on the facts the additional businesses were extensions of the original family business. As the 1st respondent is administrator of his father's estate, he is subject to the equitable doctrine that any person in a fiduciary capacity is not allowed to make a profit out of property in regard to which the fiduciary relationship exists.

Case referred to:—

(1) *Re Thompson* (1930) Ch. 203.

COURT OF APPEAL.

R. Ramani (*T. K. Sen* with him) for the appellants.

M. Edgar for the 1st respondent.

Cur. Adv. Vult.

Mathew C.J. (with whom **Murray-Aynsley C.J. (S.)** and **Wilson J.** concurred) : — In the action which gave rise to this appeal the plaintiffs-appellants (who are the daughters of one Tan Chai E who died in 1940) claimed against the defendants-respondents certain declarations and orders for enquiries and accounts in connection with various businesses which they claimed were part of their father's estate.

Prior to his death, Tan Chai E carried on a business of shipping and forwarding agents under the name of Tan Chai E & Sons. The business continued until the Japanese occupation (1942) when it went into suspense. In February 1941 the first respondent applied for, and was granted, letters of administration of his father's estate. He extracted the grant in June 1944 and is to-day the administrator of the estate.

In October 1945 the daughters of the deceased (the appellants in this appeal) and his three sons (1st, 2nd and 3rd respondents) met at Malacca and decided to resume the business of their father. Shortly after this meeting, the 1st respondent and an old friend of his father resumed the business under its original name. In 1946 the old friend was paid out, and the 1st respondent carried on alone, the name of the business being registered in the name of Tan Chai E & Co.

In 1946 the 1st respondent started at Port Swettenham the business of a loading and an un-loading contractor and labour supplier in his own name, and in 1947 the business of Kuala Stevedoring Company was started, with all the respondents registered as partners.

It is unnecessary to set out in detail the various negotiations that took place between the 1st respondent and the Malayan Railway Administration, but in 1949 the Cargo Handling Corporation Ltd., was inaugurated which took over the business of the Kuala Stevedoring Company, and the business of Tan Chai E & Co., Ltd., was incorporated which took over the business of Tan Chai E & Co. Shares were allotted in different amounts to the sons and daughters of Tan Chai E, but of the 560 shares issued 250 were allotted to the 1st respondent. It would also appear that until the incorporation of separate companies all the various enterprises were run as one concern.

The simple contention of the appellants is that all these businesses are but an extension of the resumed business of Tan Chai E & Sons which was carried on by their father, and that these businesses and the profits accruing therefrom should be regarded as being part of the estate of Tan Chai E (deceased).

On the evidence before him, the learned trial judge found that:—

> "The 1st defendant, as the administrator of the estate of Tan Chai E (decd.), must be deemed, in respect of this business and of all profits arising therefrom, including the consideration received from Tan Chai E & Co. Ltd., on the acquisition of the business of Tan Chai E & Co. to have been a trustee for the persons beneficially entitled to the estate of the intestate Tan Chai E and he is liable to account to the beneficiaries for that trust property."

The learned trial judge then turned his attention to consider the business of Tan Teck Bee, the loading and un-loading contract with the Railways, Kuala Stevedoring Company, and the consideration received from Cargo Handling Corporation Ltd. in respect of the acquisition of Kuala Stevedoring Company. He came to the conclusion that as these businesses were entirely different from the original business of Tan Chai E & Sons, the 1st respondent, who had started the business, was not accountable as administrator of the estate of Tan Chai E (deceased) to the beneficiaries thereof in respect of these new businesses.

He decided this point on the authority of the principle laid down in *Re Thompson*[1] where it was held that the administrator of an estate, who had a duty of a fiduciary nature to carry on the business of the testator to the best advantage of the beneficiaries, was debarred from carrying on in his personal capacity a business which might conflict with the interests of the beneficiaries under the will whom he was bound to protect.

In my view, the above principle was not applicable to the facts in the present case. It is not disputed that the success of the various enterprises which are now comprised in the business of the Cargo Handling Corporation Ltd. was due almost entirely to the enterprise and energy of the 1st respondent, but he is in a fiduciary relationship to the beneficiaries of the estate of Tan Chai E (deceased), and there can be no doubt on the evidence that these new enterprises all flow from the original business of Tan Chai E & Sons which formed part of the estate of Tan Chai E (deceased). It was clearly in the contemplation of the beneficiaries of the estate when they held their family meeting in October 1945 that the moment was ripe to resuscitate their family business and extend it to include those stevedoring operations which had been carried on pre-war at Port Swettenham by a Mr. Van Tooren who died during the Japanese occupation. It is clear that

more profitable business would be secured if the three services of documentation, loading and stevedoring could all be provided by the family business which pre-war had confined itself to documentation.

I would accordingly allow this appeal with costs here and below and order that the declarations and orders prayed for in the plaint be made — the costs to be paid by respondents other than infants. The deposit in Court will be paid to the appellants.

Appeal allowed.

Solicitors: *T. K. Sen; Bannon & Bailey.*

LIAN WAH CONTRACTORS v. V. GOPAL & ANOR.

[A.C.J. (Murray-Aynsley C.J.) November 29, 1954]

[Singapore — District Court Appeal No. 27 of 1954]

Labour Ordinance (Cap. 69), s. 45 — Sub-contractor for labour — Claim by — Money due under sub-contract and "extras" — Whether claim for "wages" — Jurisdiction of Controller.

In this case the respondents entered into a sub-contract for the construction of a road. The head contractor supplied the materials, the respondents the tools. The contract was for the making of a considerable stretch of road at so much a square yard, for which the respondents seem to have employed at times more than 50 men each. There were disputes relating to the conditions or period of employment, to advances of goods or money, to wages or to keeping accounts. The respondents claimed money due under the sub-contract and considerable sums for "extras". The learned Asst. Commissioner for Labour decided that the dispute fell within his jurisdiction under s.45 of the Labour Ordinance and found for the respondents as claimed. It was admitted on appeal that if the Controller had jurisdiction what was claimed must be brought within the category of "wages".

Held: (1) the fact that sub-employment by the "labourer" was contemplated in every case did not prevent his remuneration from being in the category of "wages"; (2) in the circumstances of the case to describe the claim as one for "wages" would be to give that word a quite unnatural meaning, and therefore the Controller lacked jurisdiction.

DISTRICT COURT APPEAL.

L. A. J. Smith for the appellants.

R. K. Booker for the respondents.

Cur. Adv. Vult.

Murray-Aynsley C.J.: — This appeal raises a question of jurisdiction. Section 45 of Cap. 69 confers jurisdiction in certain cases; this jurisdiction depends on the status of the parties, and the nature of the cause of action. As regards parties, there must be a dispute between an employer and a labourer. "Employer" and "Labourer" are defined in section 2. Further by sub-section 6 of section 45 "labourer" includes a sub-contractor for labour. The last phrase is not defined.

In the present case the respondents entered into a sub-contract for the construction of a road. The head contractor supplied the materials, the respondents the tools. As these were of a very simple character, I am prepared to agree that the respondents were sub-contractors for labour within the meaning of the sub-section.

However, the jurisdiction is limited to certain causes of action. These are disputes relating to the conditions or period of employment, to advances of goods or money, to wages or to keeping of accounts. In the present case the respondents claimed money due under the sub-contract and considerable sums for "extras". It is admitted that if the Controller has jurisdiction what is claimed must be brought within the category of "wages". The matter is not without difficulty and I do not think that the fact that sub-employment by the "labourer" is contemplated in every case prevents his remuneration from being in the category of "wages". But in the present case the contract was for the making of a considerable stretch of road at so much a square yard, for which the respondents seem to have employed at times more than 50 men each. In these circumstances it seems that to describe the claim as one for "wages" would be to give that word a quite unnatural meaning. Therefore, I find that the Controller lacked jurisdiction and his award must be set aside.

Appeal allowed with costs. Deposit to appellants.

Appeal allowed.

Solicitors: *Donaldson & Burkinshaw; Allen & Gledhill.*

THE FIRM OF A.M.K.M.K. v. M. RM. PERIANAN CHETTIAR

[P.C. (Lord Oaksey, Lord Morton of Henryton and Lord Keigh of Avonholm) January 11, 1955]

[Privy Council Appeal No. 23 of 1954]

Debtor and Creditor (Occupation Period) Ordinance, 1948, s. 8 — Debtor and creditor carrying all payments made by either of them to a current account — Payments made during Occupation period — Credit balance offsets pre-Occupation debts — Meaning of "first".

Where a creditor having a right to appropriate moneys paid to him generally, and not specifically appropriated by the person paying them, carries them into a particular account kept in his books, he *prima facie* appropriates them to that account, and the effect of that is, the payments are *de facto* appropriated according to the priority in order of the entries on the one side and on the other of that account.